Supreme Court, U.S.
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In The Supreme Court of the United States

JIGNESHKUMAR NATVARLA PATEL,
Petitioner,

v.

JOHN ASHCROFT,
U. S. ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

REKHA SHARMA-CRAWFORD
Sharma-Crawford, LLC
7208 West 80th, Ste. 207
Overland Park, Kansas 66204
(913) 385-9821

Counsel for Petitioner

LANTIGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

PETITION FOR A WRIT OF CERTIORARI

Jigneshkumar Patel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

QUESTIONS PRESENTED

In 2001, this Court determined in INS v. St. Cyr, 533 US 289 (2001) that an alien has the right to seek relief that is discretionary because there is a clear difference between facing possible deportation and facing certain deportation.

This case presents two questions regarding these standards:

1. In light of INS. v. St. Cyr, 533 US 289 (2001), does an alien have the right to apply for discretionary relief regardless of the ultimate decision in the case?

2. Does the court have jurisdiction to review a decision where the opportunity to apply for discretionary relief was denied and prejudice has been established?

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Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit, which this Court is asked to review on certiorari, is not reported. The opinions of the Executive Office for Immigration Review are not reported.

STATEMENT OF JURISDICTION

This petition for certiorari seeks review of a decision of the United States Court of Appeals for the Fifth Circuit. Jurisdiction of this cause is provided by 28 USC §1254(1), which provides,

> Courts of appeals; certiorari; certified questions
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

The Court of Appeals entered the order of which review is sought on July 19, 2004. A Petition for Rehearing and Petition for Rehearing En Banc was timely filed by the Petitioner. Both the Petition for Rehearing and Petition for Rehearing En Banc were denied on August 25, 2004. This Petition for certiorari is timely filed within 90 days of those denials.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides that "No person shall be...deprived of life, liberty, or property, without due process of law."

Because this cause arises from the proceedings of federal agencies, the Department of Justice (DHS), Department of Homeland Security (DHS), the Bureau of Immigration and Customs Enforcement (ICE) and Executive Office for Immigration Review (EOIR), its legal questions are governed by numerous statutes and regulations. Because they are lengthy, therefore, their citations are set out here, and the salient parts are copied out in the Appendix at "a."

STATEMENT OF THE CASE

The jurisdiction of the Appeals Court to review the decision of the Board of Immigration Appeals (BIA) and immigration court is explicitly granted by statute, INA §242(a)(1), 8 USC §1252(a)(1).

Course of Proceedings

The proceedings that led to this Petition for Certiorari began over five years ago. The subject of this petition is the decision of the Court of Appeals upholding an order of the Board of Immigration Appeals (BIA) dismissing an appeal from an immigration judge's order of deportation. Because the BIA merely adopted the findings of the immigration judge, the record in the immigration court was the subject of review by both the BIA and the Court of Appeals.

Additionally, after a Petition for Review was filed with the Court of Appeals, a Motion to Re-Open and Reconsider was filed with the BIA. After the BIA denied the Motion to Re-Open and Reconsider, a second Petition for Review was filed with the Court of Appeals. Both Petitions for Review were then consolidated for purposes of judicial economy.

Oral argument in this case was heard by the Fifth Circuit Court of Appeals. The Court ultimately denied the case stating that they were statutorily barred from reviewing Petitioner's claim. A petition for re-hearing was filed and it too, denied. Petitioner now petitions this Court for a writ of certiorari.

Facts

Jigneshkumar Patel ("Jignesh"), is a native and citizen of India who last entered the United States on February 18, 1997 as a conditional resident based upon his marriage o a United States Citizen. In accordance with cultural mandates, Jignesh's marriage to Sonal K. Patel ("Sonal"), on April 28, 1996, was arranged by members of both of their families. They, initially, exchanged photographs and communicated by telephone and letters. Sonal and Jignesh were married in a religious ceremony held in Gujarat India. Approximately 1000-1500 people attended the traditional wedding festivities. Sonal had returned to India on vacation leave from her job. Following the ceremony, Jignesh and Sonal lived together in India as husband and wife for approximately 16 days until Sonal had to return to the United States.

On May 31, 1996, Sonal, herself, prepared, signed and filed an I-130 for Jignesh. This application was approved on July 16, 1996. Jignesh received his Immigrant visa in

January of 1997 and arrived in the United States on February 18, 1997.

The tradition, which had brought this couple together, seemed to also be pulling them apart. While belonging to the same culture, many cultural differences began to become apparent. Sonal, a United States citizen and a resident of the United States since the age of 3, was in many senses, "Americanized". Jignesh, brought up in India, had a different paradigm for a husband and wife relationship. Jignesh expected Sonal to take on a more "traditional" role while Sonal expected a more "modern" role. Conflict, fights and dissatisfaction began to grow rapidly. This marriage had become victim to domestic disputes that were the result of real and sincere value conflicts.

Petitioner, his uncle, his aunt, and a friend of the family went to California in June, 1997 to broker a reconciliation. Unfortunately, no matter what the family did, for some reason, Sonal was unwilling to resurrect her floundering marriage. Even though the union had fallen victim to matrimonial discord, Sonal and Jignesh intended to be married and establish a life together.

On January 4, 1998, Sonal and Jignesh were divorced. Thereafter, Jignesh agreed to have his parents arrange a second marriage. This marriage also took place in accordance with Indian traditions and customs. (A.R. 390-392). Jignesh married Jigesha Patel on October 8, 1998.

On November 17, 1998, Jignesh filed, though counsel, Shola Sutton, an application to terminate the conditional status on his greencard. The government then issued a Notice of Intent to deny the request to terminate the conditional status. In response to the Notice of Intent to Deny, Jignesh wrote to Officer Phillips and sought assistance in securing information from his, now, ex-wife, Sonal. The

government responded to Jignesh's request by denying his application on July 15, 1999 and issuing a Notice to Appear on July 24, 1999.

On or about August 16, 1999, Jigesha filed a Relative Petition and an Application for Adjustment of Status on behalf of her husband. The government still has not adjudicated these applications.

Jignesh was never prepared for his removal hearing and was not advised by counsel as to what would occur in his hearing. He was also not advised of the need to provide any affidavits or other testimony to establish his case before the Immigration Judge.

At Jignesh's trial, on February 29, 2000, no other witnesses were called on his behalf, including his wife of over a year. Mr. Sutton was ill-prepared and unaware of what he need to do to best represent his client.

The Immigration Judge found Petitioner removable under INA §237 (a)(1)(B)(i) [termination of resident status] and INA §237 (a)(1)(G)(i) [presumed fraudulent marriage]. Petitioner sought a waiver of the first ground of removability under INA §216 (c)(4)(B)

The Immigration Judge denied Petitioner's case and granted him voluntary departure in lieu of removal.

Petitioner was eligible for relief under 8 U.S.C. §1227(a)(1)(H), INA §237(a)(1)(H) because of his new marriage to Jigesha Patel and the hardship his removal would cause to her and their children. Despite the Immigration Judge's finding of removability, this waiver would have allowed Petitioner to adjust his status and remain in the United States. However, it is this waiver that was not sought

by Petitioner's ineffective trial counsel, nor did the Immigration Judge advise Petitioner of this waiver.

It is for the ability to seek this waiver that Petitioner asks this Court to grant certiorari.

ARGUMENT FOR THE WRIT

Review is appropriate because the Appeals Court's decision is contrary to Supreme Court precedent in INS v St Cyr .

The Fifth Circut Court of Appeals held that 8 U.S.C. §1252(a)(2)(B)(ii) stripped them of the jurisdiction to review the BIA's denial of an immigrant's motion to re-open "if the underlying relief sought was committed to the BIA's discretion" since such a denial was not a violation of an immigrant's due process rights.

The danger of this holding results when the important distinction between receiving and having the opportunity to apply for discretionary relief is blurred. By merging these two concepts, such a holding incorrectly suggests Appellant contended that he was entitled to be granted discretionary relief. Rather, the question, at the onset, before the Court was only whether the Appellant should be entitled to apply for relief.

In *United States v. St. Cyr*, 533 US 289 (2001), the petitioner challenged the finding that he was ineligible for INA §212(c)[1] relief and thus was deprived the opportunity to apply for such relief. The Court found that it would raise a substantial constitutional question implicating the Suspension

[1] §212(c) of the Immigration and Nationality Act allowed an individual being deported from the United States to seek discretionary relief from removal.

Clause if St. Cyr could not have his removal order, and therefore his legal challenge, reviewed. *St. Cyr*, 533 U.S. at 300-301. Thus, if there were no right or liberty interest in applying for relief, as the Panel holding finds, then there would have been no cause for the *St. Cyr* Court's constitutional concern about the potential elimination of federal court review.

Importantly, the Supreme Court in *St. Cyr*, recognizing the distinction, remarked:

> [T]he fact that §212(c) relief is discretionary does not affect the propriety of our conclusion. There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation."

St. Cyr, 533 U.S. at 325.

The Court also stated that "this case raises only a pure question of law as to respondent's statutory eligibility for discretionary relief, not, as the dissent suggests, an objection to the manner in which discretion was exercised." *533 U.S. at 314*, n.38. Thus, *St Cyr* supports the proposition that courts must review legal and constitutional challenges to the denial of the opportunity to apply for §212(c) relief regardless of the discretionary nature of such relief. *See also Arevalo v. Ashcroft*, 344 F.3d 1,6 (1st Cir. 2003).

The Fifth Amendment Due Process Clause protects aliens in removal proceedings. *U.S. Const. Amend. V.* Due process, in deportation [removal] proceedings, "includes the right to a full and fair hearing." *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994). *See also Goonsuwan v. Ashcroft*, 252 F.3d 383, 385 n.2 (5th Cir. 2001) (holding that individuals have "constitutionally protected right to

procedural due process when deportation proceeding are initiated against them").

The opportunity to apply for discretionary relief from removal is synonymous with the opportunity to defend against deportation. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997) (finding that the elimination of a defense to fraud on the government attaches new disability); *Alvarez-Portillo*, 280 F.3d at 867 (finding noncitizens have a "reasonable expectation" of defending against removal by seeking discretionary relief). The opportunity to defend against deportation is essential to a full and fair hearing.

While there is no right to be granted discretionary relief, there is a statutory right to apply for discretionary relief for which one is eligible and a constitutional right to defend against removal. Appellant, due to ineffectiveness of counsel, was denied his right to seek the discretionary relief he was eligible for in any meaningful way. Therefore, he was denied due process as contemplated by the Constitution and as reinforced in *St. Cyr*.

Review is warranted because there is a split in the sister Circuits and the decision of the Fifth Circuit Court of Appeals further amplifies the division of lower courts.

The decision of the Court of Appeals joins that of some of it's sister circuits in the holding that immigrants do not have a right to the judicial review of decisions that deny them the ability to seek discretionary relief.

At least 7 circuits have held that, because discretionary relief is necessarily a matter of grace rather than of right, aliens do not have a due process liberty interest in consideration for such relief. *See United States v. Lopez-*

Ortiz, 313 F.3d 225 (5th Cir. 2002); *Oguejiofor v. AG of the United States*, 277 F.3d 1305, (11th Cir. 2002); *Smith v. Ashcroft*, 295 F.3d 425, (4th Cir. 2002), *United States v. Torres*, 383 F.3d 92 (3rd Cir 2004), *Escudero-Corona* v. INS, 244 F.3d 608, (8th Cir. 2001), *United States v. Aguirre-Tello*, 353 F.3d 1199 (10th Cir 2004).

Despite this seeming solidarity, there is discord among the Circuits as to the review necessary or available to an immigrant, qualified for a discretionary waiver, yet through some procedural defect unable to pursue that waiver.

Those Circuits, the Second, Seventh, Ninth and, in an air of contradiction, the Eighth, allow for a showing of prejudice to the immigrant because of the unavailable discretionary relief to trigger a remand to explore that relief.

In embracing this logic, the Second Circuit in *US v. Copeland*, 2004 US App. LEXIS 14658 (2nd Cir. 2004), analyzed the matter as follows:

> The appropriate test for prejudice is the one used to decide ineffective assistance of co[illegible]el claims, namely, prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington* 466 U.S. 668, 694, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). This analogy is close-fitting because the denial of an opportunity to apply for Section 212(c) relief will generally be the result either of a lawyer having caused an eligible alien to fail to apply, *United States v. Perez*, 330 F.3d 97, 104 (2d Cir. 2003), or of an IJ, owing special duties to a pro se alien, having failed to give notice of such an opportunity, see supra at 5- 6. In the latter case, therefore, prejudice is shown

> where there is a reasonable probability that, but for the IJ's unprofessional errors, the alien would have been granted Section 212(c) relief.

Copeland at 35-36.

The Eighth Circuit, too has recognized that the distinction between the ability to seek relief and the ultimate decision regarding the relief. The Court in *Patel v. Ashcroft*, 2004 US App. LEXIS 14307 (8th Cir. July 13, 2004) ordered a remand where the immigrant showed that she was eligible for the relief she sought even though it was discretionary. The Court held:

> In the sound exercise of his discretion, the Attorney General may still deny Ms. Patel the adjustment, should other evidence belie the legitimacy of her marriage on remand. Here, we only determine the approved visa petition makes Ms. Patel facially eligible for the adjustment of status.

The Seventh Circuit has explored this concept in its decision in *United States v. Miseal Roque-Espinoza*, 338 F.3d 724 (7th Cir. 2003). Like this Court in *St Cyr*, the Seventh Circuit recognized the difference in seeking discretionary relief as opposed to seeking a reversal of a discretionary decision stating:

> There may be an important distinction between an alien's claim that she has a right to seek discretionary relief, and the very different claim that she has a right to have that discretion exercised in a particular way. Depending on the nature of the underlying interest implicated, denial of the first might violate basic principles of due process, even though it is clear that no claim can be stated with regard to the latter.

The Ninth Circuit in *United States v. Ubaldo-Figueroa*, 364 F.3d 1042 (9th Cir 2004) has also held that interference with the ability to explore discretionary relief is grounds for a reversal. There the Court held: " Because Ubaldo-Figueroa could have sought § 212(c) relief had his underlying removal hearing been constitutionally adequate, his removal order cannot stand as a basis for his convictions."

In the context of another "discretionary waiver" under INA 212(h), the Court, in *Bonhometre v. Ashcroft*, No. 03-3689 (E. Dist. Penn. 2004), recognized the unique need in removal cases to preserve the rights of an alien to at least apply for relief from removal. In so doing, the Court held:

> With its ever-changing maze of regulations, statutes, EOIR decisions, and judicial opinions, the dizzying complexity of immigration law demands the skill of an experienced lawyer. Because so few aliens are likely to possess such thorough knowledge of the laws of a nation of which they are not citizens, many eligible aliens risk failing to apply for relief from removal.
>
> Though the presence of sufficiently experienced counsel may mitigate these risks, the record in this case suggests that Bonhometre's lawyer lacked the requisite experience. Despite the reasonable possibility that Bonhometre was eligible, the attorney failed to apply for relief under either § 212(h) or the Convention, and the transcript of the removal hearing reveals enough stumbles to remind us that the mere presence of an attorney cannot always ensure that the client knows of all avenues for relief that remain available to him.

Bonhometre at 17.

The final split in the Circuits arises in *Nakamoto v Ashcroft*, 363 F.3d 874, (9th Cir 2004) where the Court held that a determination of removablility under INA §237 (a)(1)(G)(i) is not committed wholly to the discretion of the Attorney General, and thus, not barred by INA §242(a)(2)(B)(iii), 8 USC §1252(a)(2)(B)(iii). *Nakamoto* at 879-880. It is the finding of the Immigration Judge against Petitioner under this statute that renders him permanently barred from the United States. It is this finding that threatens to permanently separate Petitioner from his citizen wife and three children.

The relief sought by Petitioner under INA 212(h); 8 U.S.C. § 1227(a)(1)(H) provides a reprieve against this penalty for a finding of marriage fraud. While this relief is discretionary it now appears that the methodology used by the Immigration Judge, the BIA and the Fifth Circuit as applied to this finding in Petitioner's case was flawed and violative of his due process rights. If this methodology was wrong then the inability to seek relief against the drastic consequences of such a finding must also be violative of Petitioner's due process rights.

Petitioner is in the same position as Enrico St Cyr. He had discretionary relief available to him that he was prevented from receiving. Petitioner is also analogous to Karnail Virk,(*Virk v. INS*, 295 F.3d 1055 (9th Cir 2002), who, in his case, was granted such relief by the Ninth Circuit under INA 237(a)(1)(H); 8 U.S.C. § 1227(a)(1)(H). A comparison of the facts in both cases reveals that Petitioner, if allowed the opportunity to apply for that relief, would have likely been granted the ability to remain in the United States.

It is easy to argue the abstract concepts of discretion and due process. It is, however, a more difficult task to remember that these concepts have distinct and, for

Petitioner, permanent effects on the lives of citizens and non-citizens alike.

CONCLUSION

The petition for the writ of certiorari should be granted. The opinion of the Court of Appeals conflicts with the holding of this Court. The opinion of the Court of Appeals conflicts with the holdings of other Circuits. This Court therefore should reverse the Court of Appeals. This Court should grant this petition to provide uniform guidance to the lower courts as to what constitutes the rights of an immigrant to seek discretionary relief from removal.

Respectfully submitted,

REKHA SHARMA-CRAWFORD
By Rekha Sharma-Crawford
Kansas Bar No. 16531
7208 W. 80th, Ste. 207
Overland Park, KS 66204
(913) 385-9821, FAX (913) 385-9964
ATTORNEY FOR JIGNESHKUMAR PATEL

No. _____

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APPENDIX

REKHA SHARMA-CRAWFORD
Sharma-Crawford, LLC
7208 West 80th, Ste. 207
Overland Park, Kansas 66204
(913) 385-9821

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

APPENDIX

I. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JIGNESHKUMAR PATEL,
Petitioner, v. JOHN ASHCROFT
US ATTORNEY GENERAL,
Respondent.

No. 03-60323

Unpublished

July 19, 2004, Decided

SUBSEQUENT HISTORY: Rehearing En Banc and Denied August 25, 2004, *Unpublished*

PRIOR HISTORY: Petition for Review of an Order of the Board of Immigration Appeals.

DISPOSITION: The petition for review was denied.

COUNSEL: For JIGNESHKUMAR PATEL, Petitioner: Rekha Sharma-Crawford, Overland Park, KS.

For JOHN ASHCROFT, Respondent: Timothy P. McIlmail, US Department of Justice, Washington, DC., Ernesto Horacio Molina, US Department of Justice, Washington, DC.

JUDGES: Before KING, Chief Judge, and REAVLEY and EMILIO M. GARZA, Circuit Judges.

OPINION: PER CURIAM:*

Jigneshkumar Patel petitions for review of the Board of Immigration Appeal's (BIA'S) order affirming the Immigration Judge's (IJ's) determination that he is a removable alien and for review of the BIA's denial of his motion to reopen. For the following reasons, we DISMISS the petitions for review.

BACKGROUND

Patel, a citizen of India, entered the United States as a conditional permenant resident on February 18, 1997. Patel's conditional resident status was based on his April 28, 1996 arranged marriage to Sonal K.Patel (Sonal)[1], a U.S. citizen. See 8 U.S.C § 1186a(a) (1) (2000). Patel claims that he and his wife were unable to reconcile their cultural differences regarding their marriage and thus, on January 4, 1998, less than a year after he joined his wife in the United States, the couple divorced.

On November 17, 1998, Patel filed a petition to remove the condition on his permanent resident status. Although he was no longer married to Sonal, he requested a waiver based on his assertion that he entered into the marriage in good faith. See id. § 1186a (c) (4) (B). The Immigration and Naturalization Service (INS) denied Patel's waiver application, terminated his conditional resident status, and initiated removal

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* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[1] The government identifies Patel's wife as Sonal Kantibhai; however, because she is listed as either Sonal Patel or Sonelle Patel throughout the administrative record, we refer to her as Sonal Patel.

proceedings by serving him with a Notice to Appear on July 24, 1999. In the notice, the INS charged Patel as removable under 8 U.S.C. § 1227 (a) (1) (D) (i), as an alien whose conditional status has been terminated, and under 8 U.S.C. § 1227 (a) (l) (G) (2000), as an alien who procured a visa by marriage fraud.

Before the IJ, Patel conceded that he entered the country as a conditional resident by virtue of his marriage to Sonal and that this marriage had been judicially terminated. After reviewing the evidence in the record, the IJ concluded that Patel had failed to carry his burden of proving that he entered his marriage in good faith, either to obtain a good-faith marriage waiver or to disprove the INS's allegation that he obtained his visa by marriage fraud. Accordingly, the IJ held that Patel was removable under §§ 1227 (a) (l) (D) (i) and 1227 (a) (l) (G) and granted Patel a 60-day period of voluntary departure.

Patel appealed this decision to the BIA, claiming that the IJ erred by not requiring the INS to prove, by clear and convincing evidence, that Patel married Sonal with the sole purpose of evading the immigration laws. Patel further argued that he had shown, by a preponderance of the evidence, that he married Sonal in good faith.. On March 20, 2003, the BIA summarily affirmed the IJ's decision and ordered that Patel voluntarily depart the United States within thirty days. Patel petitioned this court for review of the BIA's decision.

Patel also file a motion to reopen and to reconsider with the BIA, claiming that his counsel had been ineffective during the IJ hearing and requesting an extension of his voluntary departure during the pendency of the motion. Without addressing Patel's request for an extension of his voluntary departure, the BIA denied

Patel's motion to reopen after concluding that Patel had not demonstrated that his counsel's conduct had been so egregious as to render the proceedings unfair. Patel subsequently petitioned this court for review of the BIA's decision denying his motion to reopen, and the case was consolidated with his petition for review of the BIA's decision in his direct appeal.

I. Discussion

A. BIA's Final Order of Removal

In his petition for review of the BIA's March 20, 2003 order, Patel first argues that his removal proceedings were rendered fundamentally unfair because the IJ did not require the government to establish his removablility by clear and convincing evidence before placing the burden on Patel to demonstrate his eligibility for a waiver of that removablility. We review questions of law, including the application of burdens of proof, de novo. See Mikhael v. INS, 115 F.3d 299, 305 (5th Cir. 1997). Although generally "[w]e have authority to review only and order of the BIA, not the IJ," id at 302, when as here, the BIA summarily affirms an IJ's decision, the latter decision forms the basis of this court's review, see Moin v. Ashcroft, 335 F.3d 415, 418 (5th Cir. 2003). "[T]his Court must affirm the decision if there is no error of law and if reasonable, substantial, and probative evidence on the record, considered as a whole, supports the decision's factual findings." Id.at 418.

Although not raised by the parties, we must, as an initial matter, determine whether we have jurisdiction to review the BIA's order of removablility. See Ojeda-Terrazas v. Ashcroft, 290 F.3d 292, 294 & n.4 (5th Cir. 2002) ; Goonsuwan v. Ashcroft, 252 F. 3d 383, 385 (5th Cir. 2001). In general, this court may review final orders of removal under 8 U.S.C. § 1252 (a) (l) (2000) ; however, § 1252 (a)

(2) (B) (ii)[2] bars us from asserting jurisdiction over " any . . . decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General." In its order, the BIA affirmed the IJ's decision that Patel was deportable both under § 1227 (a) (l) (G), for marriage fraud. Before the IJ, Patel asserted that he should have been granted a vwaiver of his removablility under § 1227 (a) (l) (D) (i) because he entered into his marriage in good faith. See § 1186a (c) (4) (B). The decision whether to grant this waiver is, however, committed by statute solely to the discretion of the Attorney General. See Assad, No. 01-60201, manuscript 6-7 (citing Urena-Tavarez v. Ashcroft, 367 F. 3d 154, 160 (3rd Cir. 2004)). Therefore, this jurisdictional bar in § 1252 (a) (2) (B) (ii), by its terms, bars federal court review of the BIA's final order of removablility.[3]

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[2] Section 1252 (a) (2) (B) (ii) is part of the permanent jurisdictional rules enacted by Congress in § 306 (a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), see Pub. L. No. 104-208, 110 Stat. 3009-546, -607 to –612. These rules apply to Patel's petitions for review because the INS initiated his removal proceedings after April 1, 1997. See Assaad v. Ashcroft, No. 03-60201, manuscript at 4 n.1 (5th Cir. July 19, 2004).

[3] We note that the Ninth Circuit has recently held that § 1252 (a) (2) (B) (ii) does not bar federal court jurisdiction over an alien's appeal from a BIA order finding him deportable under § 1227 (a) (1) (G) for marriage fraud. See Nakamoto v. Ashcroft, 363 F.3d 874, 878 (9th Cir. 2004). Nakamoto thus appears to support Patel's contention that we may review the marriage-fraud aspects of the BIA's order. But, our precedents indicate that, where an "order of removal cites two [independent] bases for removal" and "the jurisdiction-stripping provisions of § 1252 clearly apply" to one of these bases, then "it does not matter for the purposes of determining the scope of our jurisdiction under [§ 1252] that the order of removal is also based on" a ground not covered by § 1252's jurisdictional bars. Flores-Garza v. INS, 328 F.3d 797, 802 (5th Cir. 2003). Instead, in these situations, we must dismiss the petition for review based on our lack of jurisdiction to review the first independent gourn of removability; here, the determination that Patel is not entitled to a discretionary good-faith marriage wiaver of his conceded removability under § 1227 (a) (1) (D) (i). Id.

Our determination that § 1252 (a) (2) (B) (ii) applies to the BIA's March 20, 2003 order does not conclusively resolve the question of our jurisdiction, however. Notwithstanding this provision, we may review the BIA's decision if Patel's petition presents a "substation constitutional claim []." See Balogun v. Ashcroft, 270 F. 3d 274 n. 11 (5th Cir. 2001). In arguing that the IJ's allocation of the burden of proof rendered his proceedings fundamentally unfair, Patel essentially argues that his claim arises under the Due Process Clause of the Fifth Amendment. See Animashaun v. INS, 990 F.2d 234, 238 (5th Cir. 1993) ("[T]he IJ must conduct deportation hearings in accord with due process standards of fundamental fairness.").

Patel is correct that the government generally bears "the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." 8 U.S.C. § 1229 (c) (3) (A) (2000). Here, Patel was deemed removable both as an alien whose conditional resident status has been terminated, See id. § 1227 (a) (l) (D) (i), and as an alien who procured a visa by marriage fraud, see id.§ 1227 (a) (l) (G). The first of these provision makes deportable an alien who has obtained "permanent resident status on a conditional basis under section 1186a . . . [and] had had such status terminated," id. § 1227 (a) (l) (D) (i); however, a second statute provides that "[t]he Attorney General . . . may remove the conditional basis of permanent resident status for an alien [whose qualifying marriage has been terminated] if the alien demonstrates that -- . . . the qualifying marriage was entered into in good faith by the alien spouse." Id. § 1186 (a) (c) (4) (B) (emphasis added). Similarly, under the marriage fraud provision,

> An alien shall be considered to be deportable as having procured a visa . . . by fraud . . . if –

> (i) the alien obtains any admission into the United States with and immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years prior to such admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws . . .

Id. § 1227 (a) (l) (G) (emphasis added). Thus, the analysis required under each removablility provision proceeds in two steps: first, the government must prove by clear and convincing evidence the prerequisite facts for finding the alien deportable (either because his conditional resident status has been terminated or for marriage fraud), then, the alien bears the burden of proving his eligibility for relief from removablility (i.e., that he nevertheless entered into his marriage in good faith or that he did not marry for the purpose of evading immigration laws).

Although the IJ did not explicitly state that the government met its initial burden under either provision, the IJ's implicit finding that Patel was deportable was supported by substantial evidence. Before the IJ, Patel admitted the facts that form the basis of his deportability under each section. Specifically, Patel admitted (1) that he entered the Untied States on a conditional basis in February 1997, (2) that his conditional status was based on his marriage to a U.S. citizen, and (3) that this marriage was judicially terminated in January 1998. These admissions demonstrate both that Patel was subject to termination of his conditional resident status, see id. § 1186a (b) (2) (explaining that such status will be terminated if the INS can prove by a preponderance of the evidence that the alien's marriage was judicially terminated

for a reason other than death within two years of the grant of conditional resident status), and that Patel was prima facie eligible for deportability as an alien who obtained a visa by marriage fraud see id. §1227 (a) (1) (G). Therefore, based on these admissions, it was proper for the IJ to shift the burden of proof to Patel to demonstrate either his eligibility for a good-faith marriage waiver under § 1186a (c) (4) (B) or that his marriage was not fraudulent. Accordingly, we hold that Patel's argument regarding the IJ's allocation of the burden of proof does not present a substantial constitutional claim.

Patel also contends that the IJ violated his substantive due process rights by not informing him that he was eligible for a waiver of removablility, under 8 U.S.C. § 1227 (a) (1) (H), base on hardship to his qualifying relatives: his second (and current) U.S. citizen wife and the couple's three children. See 8 C.F.R § 240.11(a) (2) (1999) (requiring the IJ to inform an alien of his apparent eligibility for any form of relief from removal). The government responds that, even if the IJ should have informed Patel of his eligibility for this relief, we lack jurisdiction over this claim because it was not fully exhausted. We agree. Patel did not claim either in his direct appeal to the BIA or in his motion to reopen that the IJ erred by not advising him of all available forms of relief.[4] See Wang v. Ashcroft, 260 F.3d 448, 452-53 (5th Cir. 2001) ("An alien fails to exhaust his administrative remedies with respect to an issue when the issue is not raised in the first instance before the BIA – either on direct appeal or in a motion to reopen."). Therefore, 8 U.S.C. § 1252(d) (1), which precludes judicial review when an alien has not "exhausted all administrative remedies available to the alien as of right," bars our jurisdiction over this claim.

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[4] In his motion to reopen Patel did argue, however, that his counsel had been ineffective for failing to advise him that he was eligible for the hardship waiver.

B. BIA's Denial of Patel's Motion to Reopen

In his second petition for review, Patel argues that the BIA erred in denying his motion to reopen based on the ineffective assistance of counsel. Patel claims that his counsel, who represented him before the IJ, was ineffective in at least three ways: (1) by failing to explain to the IJ the cultural context of his arranged marriage to Sonal, (2) by failing to object to the IJ's improper allocation of the burden of proof, and (3) by failing to advise Patel of his eligibility for a waiver of his deportability under § 1227 (a) (1) (H) based on his second marriage to a U.S. citizen and the births of his three U.S. citizen children. See §1227 (a) (1) (H) (waiving certain grounds of removablility on the basis of an alien's marriage to a U.S. citizen).

Once again, we must, as an initial matter, determine whether we have jurisdiction to review the BIA's order denying Patel's motion to reopen. As we recently explained in Assaad, No. 03-60201, manuscript at 5-7, we lack jurisdiction to review the BIA's denial of an alien's motion to reopen under 8 U.S.C. § 1252 (a) (2) (B) (ii) if the underlying relief sought by the alien was committed to the BIA's discretion.

We have already determined that we lack jurisdiction to review the BIA's decision that Patel should not be granted a good-faith marriage waiver of his removablility. Just as § 1252 (a) (2) (B) (ii) barred our review of the BIA's final order denying this form of relief, so does it bar our jurisdiction over the BIA's denial of Patel's motion to reopen. Patel also argued, however, in his motion to reopen, that he was eligible for a waiver of his removablility under § 1227 (a) (1) (D) (i) because of his current marriage to U.S. Citizen and the birth of his three U.S. Citizen children. See § 1227 (a) (1) (H). Yet, the decision whether to grant this waiver is also committed by statue solely to the discretion of

the Attorney General. See id. (stating that the removablility of an alien under the provisions of § 1227 (a) (1) "may, in the discretion of the Attorney General, be waived for any alien" who meets certain specified criteria); see also San Pedro v. Ashcroft, No. 02-74367, 2004 WI. 1296286, at " 1 (9th Cir. June 23, 2004). Therefore, because the underlying relief sought by Patel was committed to the Attorney General's discretion, § 1252(a) (2) (B) (ii) precludes judicial review of the BIA's order denying Patel's motion to reopen.

Nevertheless, as we clarified above, we may review the motion to reopen if Patel's contention that his counsel was ineffective presents a substantial constitutional claim. Patel argues that his motion satisfies this test because his counsel's alleged ineffectiveness rendered his immigration proceedings fundamentally unfair, violating his Fifth Amendment right to due process of law. This argument is legally untenable. The alleged ineffectiveness of Patel's counsel denied him, at most, the chance to receive either of the two discretionary waivers of his removablility under § 1227 (a) (1) (D) (i). Accordingly, because an alien does not have protected liberty interest in obtaining a discretionary waiver of his removablility, we hold that Patel did not raise a substantial constitutional claim in his motion to reopen. See Assaad, No. 03-60201, manuscript at 8-9.[5]

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[5] We note the possibility, raised by Patel, that his attorney's performance effectively denied him the opportunity to refute the government's contention that he was deportable for engaging in marriage fraud. Although the BIA's conclusion that Patel had committed marriage fraud may not have been purely discretionary, see supra note 2, this does not affect our conclusion that we lack jurisdiction over Patel's petition for review. Regardless of whether Patel was deportable for committing marriage fraud, the BIA independently held that he was deportable under § 1227 (a) (1) (D) (i), and the only relief Patel sought from this order was purely discretionary in nature.

Lastly, Patel contends that the BIA's refusal to grant or even to address his request, for an extension of his voluntary departure in his motion to reopen violated his due process rights. Once again, the jurisdiction-stripping provisions § 1252 eny this court the authority to review this claim, see §1252 (a) (2) (B) (i) (stating that "[n]otwithstanding any other provision of law, no court shall have jurisdiction to review—any judgment regarding the granting of relief under section . . . 1229c of this title, "which governs voluntary departure), unless Patel's petition presents a substantial constitutional claim.

Patel's contention that the BIA's refusal to extend his term of voluntary departure was constitutionally impermissible is based on a hypothetical sequence of events that has not come to pass. Her argues that, because his period of voluntary departure expired before we heard oral argument on his petition for review, if this court decides that Pate's counsel was constitutionally defective and remands the case to the BIA, the BIA could then claim that it no longer has jurisdiction over the motion to reopen because Patel would have left the country. See 8 C.F.R § 1003.4 (2004) (equating departure from the country with withdrawing an appeal). Patel thus argues that the BIA's refusal to extend his voluntary departure effectively will have deprived him of judicial review of his ineffective-assistance-of-counsel claim. Yet, we have held that Patel's attorney's performance did not violate his Fifth Amendment rights, and his attorney has also informed us, at oral argument, that Patel has not yet left the country. Therefore, Patel's voluntary-departure argument does not present a substantial constitutional claim.

III. CONCLUSION

For the foregoing reasons, we DISMISS Patel's petitions for review.

II. DECISION OF THE BOARD OF IMMIGRATION APPEALS

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Filed April 22, 2003

In re: PATEL, JIGNESHKUMAR NATVARLA
File No. A45-788-587

Panel Member:

Roger Pauly

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF THE RESPONDENT: Rekha Sharma-Crawford

APPLICATION: Reopening

We have jurisdiction over this motion pursuant to 8 C.F.R. § 1003.2. The motion is denied

We have considered the respondent's argument that he was ineffectively represented by his former attorney in these proceedings. A claim of ineffective assistance of counsel must satisfy the requirements set forth in our decision in *Matter of Lozada*, 19 I&N Dec. 637 (BIA), *aff'd*, 857 F.2d 10 (1st Cir. 1988). In *Lozada*, we held that such motions require: (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to

the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (2) that counsel whose integrity or competence is being impunged be informed of the allegations leveled against him and be given an opportunity to respond; and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Id* at 639.

It is also required that the claimant establish that he suffered prejudice as a result of his attorney's ineffectiveness. *Id* at 640. The term "prejudice," refers to actual prejudice. *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). This means that it is likely that an alien would have prevailed at the hearing or appeal had the negligent representation not occurred. *Id*. The degree of negligence that must be established for ineffectiveness is that counsel's representation was so egregious that is rendered the hearing unfair. See *Matter of B-B-*, 22 I&N Dec. 309 3367 (BIA 1998).

In the instant case, the respondent has submitted and affidavit which details all the instances in which he believes that his former attorney misrepresented him in these proceedings. He indicated that his former counsel did not adequately prepare him for the hearing. In this regard, we are unable to decipher from the affidavit exactly what testimony the respondent would have provided had his counsel spent more time preparing him for the hearing. The respondent further indicated in the affidavit that his attorney failed to call as witnesses experts on arranged Indian marriages, or asked for a continuance so his former spouse's sister could testify. The Board cannot speculate as to whether experts were available to testify at the hearing of if that would have changed the result. We further note from the affidavit that the respondent's former sister-in-law knew of the hearing, but chose not to attend. We therefore cannot conclude that the

respondent's counsel engaged in egregious conduct which rendered the hearing unfair. Based upon this lack of proof, we are unable to find that the respondent has satisfied the requirements for proving that he was ineffectively represented by his former attorney in these proceedings.

Accordingly, the following order is entered.

ORDER: The motion is denied.

Signed:

Roger Pauly
Board Member

III. DECISION OF THE BOARD OF IMMIGRATION APPEALS

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Filed March 26, 2003

In re: PATEL, JIGNESHKUMAR NATVARLA
File No. A45-788-587

Panel Member:

NEIL P. MILLER

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF THE RESPONDENT: Williamson, Peter

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(e)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set for the by the Immigration Judge and the statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c)(f).

In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

Signed:

Neil P. Miller
FOR THE BOARD

IV. DECISION OF THE IMMIGRATION JUDGE

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Houston, Texas

File No.: A 90 443 154

February 29, 2000

In the Matter of JIGNESHKUMAR NATVARLA PATEL
Respondent

IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a)(1)(B)(1) [termination of resident status] and Section 237(a)(1)(G(i) [presumed fraudulent marriage] of the Immigration and Nationality Act, as amended.

APPLICATION: Waiver of requirements of Section 216(c)(1) of the Act under section 216(c)(4)(B) of the Act

ORAL DECSION OF THE IMMIGRATION JUDGE

The Respondent is a native and citizen of India, born September 3, 1971. He is approximately 28 years of age.

The Service issued a Notice to Appear, dated July 24, 1999. The respondent appeared with counsel on October 21, 1999, admitted allegations 2 through 4; denied allegation 5; and conceded the charge under Section 237(a)(1)(D)(i) of the

Immigration and Nationality Act, as amended (the Act). The respondent denied the charge under Section 237 (a)(1)(G)(i) of the Act.

The Service filed a Form I-261 on November 2, 1999. Today, February 29, 2000, the respondent admitted the allegations on the form I-261. These allegations are 5, 6, 7, and 8.

The issues before this Court are whether the respondent is subject to deportation under Section 237 (a)(1)(G)(i) of the Act, and whether the respondent is eligible for a waiver under Section 216 (c)(4)(B) of the Act.

The respondent testified in support of his application. According to the respondent his first marriage with Sonelle Patel was an arranged marriage, conducted through his parents and her parents, and through the respondent's uncle and Sonelle Patel's uncle. Both of these uncles lived in India.

According to the respondent Sonelle Patel traveled to India, where he and Sonelle Patel were married in a traditional Hindu ceremony.

The respondent explained that in India families with the same name, in the same region, traditionally, marry within that family. The respondent further explained that both Sonelle Patel and himself were members of the same family, which is indicated by their same last name.

Respondent testified that he worked for about one year as a pharmacist in India before his marriage to Sonelle Patel.

The respondent admitted that he never shared a bank account with his first wife. He never entered into a lease with her. However, according to the respondent, he did live

with her for about nine months, from February of 1997 to November of 1997.

Respondent explained that he filed for divorce because of cultural differences and many arguments which took place between him and Sonelle Patel. Respondent described his former wife as being rude and abusive. He stated that she stayed out late with her friends, which is contrary to the way a woman should behave according to the respondent's traditional values.

During cross-examination the respondent stated again that he lived with Sonelle Patel between February of 1997 and November of 1997. The respondent that Sonelle Patel filed for divorce on May 29, 1997, three months after the respondent arrived in the United States.

The respondent explained during cross-examination that he went to his uncle's house for about a month during his marriage.

The respondent stated that he did not attend the divorce proceedings.

When questioned by the Court the respondent stat4ed that his marriage took place on April 28, 1996, in India in a traditional Hindu ceremony. The respondent explained that the marriage was arranged, and it began with the exchange of photographs in January of 1996. This led to phone contact during the first week of February. The respondent stated that he first met Sonelle Patel on March 29, 1996.

The respondent explained that his parents did consult with him about the arranged marriage, to which the respondent consented. The respondent stated that Sonelle Patel's parents also decided to agree to this marriage.

The respondent stated that although it is also a tradition in India to accept a dowry from the bride's family, no dowry was accepted by the respondent's parents.

The respondent stated that his parents have a textile mill in India, which employs 15 employees, and Sonelle Patel's parents have a motel business in the United States.

The respondent stated that he first arrived in the United States in February 1997, following his marriage. The respondent stated that his new bride stayed in India only approximately tow weeks following her marriage to the respondent. She returned to the United States on May 13, 1996. According to the respondent she returned to live in her sister's apartment.

The respondent stated that when he went to the United States in February 1997, he went to live with Sonelle Patel in her sister's apartment. The respondent's wife's sister's apartment was a two-bedroom apartment, and it was shared by the respondent and Sonelle Patel, and Sonelle Patel's sister, her husband and one child.

The respondent admitted that after three months of living with Sonelle Patel, and a number of abusive arguments, he left Sonelle Patel's residence to live with his uncle. Later, upon further questioning by Government's counsel, respondent stated that he also went to India from April of 1997 through June of 1997, which apparently is the same time period that he indicated when questioned by the Court.

Respondent admitted that he did not share any bank account with Sonelle Patel. He stated that she had her own income and she was working part-time. Respondent stated that he never talked to Sonelle Patel about obtaining their own residence.

Respondent explained that the reason that Sonelle Patel returned to the United States after being newly wed was because she only had two weeks of vacation.

The criteria for avoiding the charge under Section 237 (a)(1)(G)(i) is the same as the criteria for qualifying for a waiver under Section 216(c)(4)(B) of the Act. Therefore, the discussion of the facts in this case will relate to both the charge under Section 237 (a)(1)(G)(i) of the Act and the waiver under Section 216(c)(4)(B) of the Act.

An alien who is deportable under Section 241 (a)(D)(i) of the Act because the Service terminated the alien's conditional status is entitled to a discretionary review of the termination decision in removal proceedings before and Immigration Judge. See Sections 216 (b)(2), 216 (c)(2)(B) and 216 (c)(3)(D) of the Act.

If the Service terminates conditional residence status for failure to file a joint petition to remove the conditions on permanent resident status, or for failure to attend the required interview under 216(2)(c)(a) of the Act, respondent must establish compliance in removal proceedings. See Section 216 (c)(2)(B) of the Act.

If an alien cannot qualify for removal of the conditions of permanent resident status under the requirements of Section 216(c)(1) of the Act, the alien can apply for a waiver of such requirements by establishing the alien's good faith marriage, in the event of termination, was terminated other than by that, and the alien was not at fault in failing to file a timely petition. See Section 216(c)(4)(B) of the Act.

An Immigration Judge does not have jurisdiction over the original decision on these waivers. However, the Immigration Judge may review the denial of a waiver in removal proceedings.

The Immigration Court perceives this waiver as a form of relief from removal, and therefore the respondent has the burden of proof and persuasion to establish eligibility for the waiver. See 8 C.F.R. 240.11(e) and Section 216(c)(4) of the Act.

The denial of the respondent's waiver will be reviewed on a de novo basis because anything less than a de novo review would render the respondent's right to a hearing nugatory.

The key factor in determining whether a person entered into a marriage in good faith is whether he or she intended to establish a life together with the spouse at the time of the marriage. A person's conduct after the marriage is relevant to the extent that is bears upon his or her subjective state of mind at the time of the marriage.

A separation from one's spouse, even if it occurs shortly after a marriage, does not by itself prove that the marriage was not entered into in good faith. Bark v INS, 511 F.2d, 1200 (9th Cir. 1975).

Evidence of good faith at the time of the marriage may include, but is not limited to, proof that one's spouse has been listed as the spouse on the other spouse's insurance policy or policies, property leases, income tax forms or bank accounts; and testimony and other evidence concerning courtship, wedding ceremony, shared residence and experiences.

Under this standard the brevity of a marriage is not necessarily a controlling or an adverse factor in determining whether the marriage was a bona fide marriage.

In the instant case the respondent does not have any objective evidence of a bona fide marriage as anticipated under most situations; that is, the evidence of bank accounts,

insurance policies, shared financial endeavors, property leases, et cetera.

Under these circumstances the behavior of the respondent following the marriage becomes more important in determining whether he or she has met his or her burden of proof with regard to establishing a bona fide marriage, to qualify for a waiver, or to avoid the deportation ground under Section 237 (a)(1)(G)(i) of the Act.

To an extent the lack of objective evidence of the bona fides of the respondent's marriage is due to its brevity.

Specifically, during the course of the respondent's marriage, which took place on April 28, 1996, the respondent had spent significant amount of time apart from his spouse. The respondent's spouse departed from India following her marriage to the respondent within two weeks. It was not until February of 1997, the following year, that the respondent established actual contact with his spouse when he came to the United States, and within three months the respondent departed again to India.

Although the respondent entered into an arranged marriage, I do not believe that the behavior of the respondent and his spouse, immediately following the marriage, is consistent with an intent to remain together indefinitely.

Based on this assessment of the evidence in this case the respondent failed to carry his burden of proof with regard to the bona fides of his marriage; that is, the lack of any objective evidence, which I have discussed earlier in this case, and the respondent's behavior and his spouse's behavior immediately following their marriage.

The charge under Section 237 (a)(1)(G)(i) of the Act is sustained because the respondent has failed to carry his burden of proof and persuasion.

The respondent has also failed to carry his burden of proof with regard to the waiver under Section 216(c)(4)(B) of the Act.

There is no controversy with regard to voluntary departure under Section 240B(1) of the Act. I believe the respondent is eligible for voluntary departure as a matter of law, and is eligible for voluntary departure in the exercise of discretion. I will grant the respondent a period of voluntary departure. The ordinary time for voluntary departure is 30 days. Based on the respondent's contacts in the United States, his employment, I believe a maximum period of 60 days is appropriate.

ORDER

IT IS ORDERED that the respondent's application for a waiver under Section 216(c)(4)(B) of the Immigration and Nationality Act, as amended, is denied.

IT IS FURTHER ORDERED that the respondent be granted voluntary departure without expense to the United States to be effected on or before April 29, 2000, upon posting a $1,000 bond with the Immigration Service within five business days of this order.

IT IS FURTHER ORDERED that if the respondent fails to depart as required, or fails to comply with any other condition for voluntary departure imposed by this order or by law or regulation, the above order shall be withdrawn without further notice or proceedings, and the following order shall become immediately effective: The respondent shall be removed to India under Sections 237 (a)(1)(D)(i) and 237

(a)(1)(G)(i) of the Immigration and Nationality Act, as amended.

VI. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT ON MOTION FOR REHEARING AND HEARING EN BANC

IN THE UNITED STATES COURT OF AAPEALS
FOR THE FIFTH CIRCUIT

No. 03-60323

JIGNESHKUMAR NATVARLA PATEL

Petitioner

v.

JOHN ASHCROFT, U S ATTORNEY GENERAL

Respondent

Petitions for Review of an Order of the
Board of Immigration Appeals

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 7/19/04, 5 Cir., _____, _____ F.3d _____)

Before KING, Chief Judge, and REAVLEY and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (Fed. R. App. P. 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Signed:

Carolyn King
United States Circuit Judge

REHG – 5A

V. STATUTES INVOLVED

INA §212(c); 8 U.S.C. §1182(c)

(c) Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing contained in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). This subsection shall not apply to an alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2)(A)(iii), (B), (C), or (D), or any offense covered by section 241(a)(2)(A)(ii) for which both predicate offenses are, without regard to the date of their commission, otherwise covered by section 241(a)(2)(A)(i).

INA §216 (c)(4)(B), 8 U.S.C. §1186a

(c) Requirements of Timely Petition and Interview for Removal of Condition

(4) Hardship waiver.-The Attorney General, in the Attorney General's discretion, may remove the conditional basis of the permanent resident status for an alien who fails to meet the requirements of paragraph (1) if the alien demonstrates that-(A) extreme hardship would result if such alien is removed,

(B) the qualifying marriage was entered into in good faith by the alien spouse, but the qualifying marriage has been

terminated (other than through the death of the spouse) and the alien was not at fault in failing to meet the requirements of paragraph (1),

INA §237 (a)(1)(D)(i), 8 U.S.C. §1227 (a)(1)(D)(i)

(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(D) Termination of conditional permanent residence.-

(i) In general.-Any alien with permanent resident status on a conditional basis under section 216 (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 216A (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

INA §237 (a)(1)(G)(i); 8 U.S.C. §1227 (a)(1)(G)(i)

(a) Classes of Deportable Aliens.-Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(G) Marriage fraud.-An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 212(a)(6)(C)(i)) and to be in the United States in violation of this Act (within the meaning of subparagraph (B)) if-

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such entry of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws,

INA §237(a)(1)(H); 8 U.S.C. §1227(a)(1)(H)
(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182 (a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i)

(I) is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182 (a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is an alien who qualifies for classification under clause (iii) or (iv) of section 1154 (a)(1)(A) of this

title or clause (ii) or (iii) of section 1154 (a)(1)(B) of this title.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

INA §242; 8 U.S.C. §1252

(a) Applicable provisions.-

(1) General orders of removal.-Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section **235(b)(1)**) is governed only by chapter 158 of title 28 of the United States Code, except as provided in subsection (b) and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review.-

(A) REVIEW RELATING TO SECTION 235(b)(1).- Notwithstanding any other provision of law, no court shall have jurisdiction to review-

(i) except as provided in subsection (e), any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 235(b)(1),

(ii) except as provided in subsection (e), a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 235(b)(1)(B), or

(iv) except as provided in subsection (e), procedures and policies adopted by the Attorney General to implement the provisions of section 235(b)(1).

(B) Denials of Discretionary Relief.-Notwithstanding any other provision of law, no court shall have jurisdiction to review-

(i) any judgment regarding the granting of relief under section 212(h), 212(i), 240A, 240B, or 245, or

(ii) any other decision or action of the Attorney General the authority for which is specified under this title to be in the discretion of the Attorney General, other than the granting of relief under section 208(a).

(3)

No. 04-682

In the Supreme Court of the United States

JIGNESHKUMAR NATVARLA PATEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in a civil immigration proceeding, the failure of privately retained counsel to advise his client that he could apply for a discretionary waiver of deportation violated the Due Process Clause of the Fifth Amendment.

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In the Supreme Court of the United States

No. 04-682

JIGNESHKUMAR NATVARLA PATEL, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the Federal Reporter, but is *reprinted in* 104 Fed. Appx. 966, and is *available at* 2004 WL 1598768. The opinions of the Board of Immigration Appeals denying petitioner's motion to reopen (Pet. App. 12-14) and affirming the decision of the immigration judge ordering petitioner's removal (Pet. App. 15-16) are not reported. The decision of the immigration judge (Pet. App. 17-25) is not reported.

JURISDICTION

The court of appeals entered its judgment on July 19, 2004. A petition for rehearing was denied on August 25, 2004 (Pet. App. 26-27). The petition for a writ of

certiorari was filed on November 17, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of India. He was admitted to the United States on February 18, 1997, as a conditional resident based on his arranged marriage to an American citizen the previous year. Pet. App. 2. Eleven months later, petitioner divorced his wife. *Ibid.* Petitioner subsequently filed a petition seeking removal of the condition on his resident status on the ground that he had entered into his marriage in good faith. *Ibid.*; see 8 U.S.C. 1186a(c)(4). The Immigration and Naturalization Service (INS) denied the petition, terminated petitioner's conditional resident status, and initiated removal proceedings. The government charged petitioner with being subject to removal because his conditional residence was terminated, 8 U.S.C. 1227(a)(1)(D)(i), and because he obtained entry through marriage fraud, 8 U.S.C. 1227(a)(1)(G). See Pet. App. 2.[1]

Because petitioner conceded that his admission to the United States as a resident was conditioned on his marriage and that his marriage had been judicially terminated, the immigration judge found petitioner subject to removal. Pet. App. 3. The burden then shifted to petitioner to disprove marriage fraud or to establish that he entered into his marriage in good faith, so that he could obtain a waiver of his conditional status. *Ibid.* The immigration judge held that petitioner failed to

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[1] On March 1, 2003, the functions of the INS were transferred to the Department of Homeland Security and assigned within that Department to Immigration and Customs Enforcement. See Homeland Security Act of 2002, Pub. L. No. 107-296, § 441(2), 116 Stat. 2192 (6 U.S.C. 251(2) (Supp. II 2001)).

produce "any objective evidence of a bona fide marriage," *id.* at 22, given the undisputed evidence of the marriage's brevity, the very short time (three months) that the couple actually lived together, and the absence of any joint financial endeavors or obligations, *id.* at 22-23. The immigration judge accordingly ordered petitioner removed and granted petitioner's request for voluntary departure. *Id.* at 24. Petitioner appealed, arguing that the evidence established a good-faith marriage and that, in any event, the immigration judge failed to require clear and convincing evidence by the INS that the sole purpose of the marriage was to evade the immigration laws. The Board of Immigration Appeals (Board) affirmed without opinion. Pet. App. 15-16.

2. Petitioner sought review of the Board's decision in the United States Court of Appeals for the Fifth Circuit. While that appeal was pending, petitioner filed with the Board a motion to reopen his proceedings on the ground that his attorney's representation was ineffective. Pet. App. 3, 12. The Board denied reopening. The Board found that petitioner failed to establish that additional expert or other testimony was available, non-duplicative, and material to his case. "Based upon th[at] lack of proof," the Board held that counsel did not engage in the type of egregious conduct that could be deemed to have rendered the proceedings unfair. *Id.* at 13-14. Petitioner also sought review of that decision in the court of appeals.

3. The court of appeals denied both petitions for review in a single, unpublished, per curiam decision. Pet. App. 1-11. With respect to the Board's final order of removal, the court held that it lacked jurisdiction to review the denial of discretionary relief. *Id.* at 5. The court explained that petitioner's arguments centered on

the Board's failure to grant a discretionary waiver of removability based on the alleged bona fides of his marriage. Because the immigration law commits the decision to grant such a waiver "solely to the discretion of the Attorney General [now, the Secretary of Homeland Security]," *ibid.*, the court concluded that federal jurisdiction is barred by 8 U.S.C. 1252(a)(2)(B)(ii). That Section proscribes federal court review of "any * * * decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii).

While the court stated that it retained jurisdiction to review any claim of a substantial constitutional violation, Pet. App. 6, the court concluded that petitioner's argument concerning the allocation of the burden of proof during his proceedings did not rise to that level, *id.* at 8. Indeed, the court explained that the text of the relevant statutory provisions expressly put the burden of proving a good-faith marriage on the alien once the government established that he was admitted on a conditional basis, that the conditional status (the marriage) was terminated, and that the marriage ended within two years of admission. See Pet. App. 6-7 (citing 8 U.S.C. 1186a(c)(4), 1227(a)(1)(G)).

The court also rejected petitioner's argument that the immigration judge denied him substantive due process by failing to inform him that he could apply for a waiver of removability under a different statutory provision, 8 U.S.C. 1227(a)(1)(H), based on the hardship removal would cause to his second wife and children. Pet. App. 8. The court held that it lacked jurisdiction over that claim because petitioner had not raised it before the immigration judge or the Board and thus had

failed to exhaust his administrative remedies, as required by 8 U.S.C. 1252(d)(1).

The court of appeals also affirmed the Board's decision not to reopen petitioner's immigration proceedings. Pet. App. 9-11. The court again concluded that it lacked jurisdiction because the claims of ineffective assistance of counsel pertained to forms of relief that are committed to the sole discretion of the Attorney General (or, now, the Secretary of Homeland Security). *Id.* at 9-10. In addition, the court rejected as "legally untenable," petitioner's argument that counsel's ineffectiveness amounted to a denial of due process because he lacked any protected liberty interest "in obtaining a discretionary waiver of his removability." *Id.* at 10.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioner's argument (Pet. 5-6) for this Court's review centers on the alleged failure of the immigration judge and his private attorney to advise him that he could apply for discretionary relief from removal under 8 U.S.C. 1227(a)(1)(H) based on his later marriage to another United States citizen. With respect to petitioner's claim that the immigration judge failed to apprise him of this opportunity (see Pet. 6, 12), this Court lacks jurisdiction. As the court of appeals explained (Pet. App. 8), petitioner failed to exhaust that claim. He never presented it to the immigration judge or to the Board of Immigration Appeals; he raised it for the first time in the court of appeals. See *ibid.* Petitioner cites no authority from this Court or any court of ap-

peals that would allow federal court review of that unexhausted claim.

For that same reason, petitioner's argument (Pet. 9, 11) that the court of appeals' decision conflicts with the Ninth Circuit's decision in *United States* v. *Ubaldo-Figueroa*, 364 F.3d 1042 (2004), and the Second Circuit's decision in *United States* v. *Copeland*, 376 F.3d 61 (2004), is without merit. Those cases addressed whether an immigration judge's failure to advise an alien of the availability of certain forms of relief rendered his proceedings fundamentally unfair. See *Copeland*, 376 F.3d at 71; *Ubaldo-Figueroa*, 364 F.3d at 1050. The court of appeals in this case did not address that question at all, due to petitioner's failure to exhaust his administrative remedies. See Pet. App. 8. There thus is nothing for the Second and Ninth Circuits' decisions to conflict with.

2. Petitioner's argument that the court of appeals erred in sustaining the Board's decision not to reopen the case fares no better. That argument rests on the alleged failure of petitioner's privately chosen counsel to inform him that he could apply for discretionary relief under 8 U.S.C. 1227(a)(1)(H) based on his second marriage. The court of appeals correctly ruled that the decision not to reopen proceedings based on error allegedly committed by the alien's own attorney —concerning a possible application for discretionary relief from a valid determination that he was subject to removal—is a decision that is committed to the sole discretion of the Board of Immigration Appeals. Indeed, petitioner identifies no case that has held that alleged omissions in the advice rendered by the *alien's privately retained counsel* concerning possible forms of such discretionary relief constituted a *deprivation* of liberty without due process by the *federal government.*

Cf. *Coleman* v. *Thompson*, 501 U.S. 722, 752-753 (1991) (in habeas corpus proceedings, the petitioner "cannot claim constitutionally ineffective assistance of counsel" he has privately retained; the petitioner "must bear the risk of attorney error" (internal quotation marks omitted)). After all, petitioner was free at all times to pursue the very relief he now belatedly seeks; he had the same opportunity to do so as persons who cannot afford or who choose not to retain counsel; and the government did nothing to prevent, frustrate, or deter the pursuit of such discretionary relief.

In that respect, the court of appeals' decision here accords with the decisions of other courts of appeals. In *Dave* v. *Ashcroft*, 363 F.3d 649 (2004), the Seventh Circuit denied an alien's due process claim based on ineffective assistance of counsel and alleged procedural error by the Board on the ground that aliens have no liberty interest in the discretionary grant of cancellation of removal. *Id.* at 652. Likewise, in *United States* v. *Torres*, 383 F.3d 92 (2004), the Third Circuit rejected the claim that an alien has a constitutionally protected right to be considered for purely discretionary relief from deportation. *Id.* at 105.[2] Indeed, petitioner him-

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[2] See also *United States* v. *Aguirre-Tello*, 353 F.3d 1199, 1204 (10th Cir. 2004) (alien has no constitutional right to be informed of discretionary relief that might be available to him); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003) (rejecting ineffective assistance of counsel claim because "[t]he failure to receive discretionary adjustment-of-status relief does not constitute the deprivation of a constitutionally-protected liberty interest"); *Garcia* v. *Attorney General*, 329 F.3d 1217, 1223-1224 (11th Cir. 2003) ("attorney's deficient representation does not deprive an alien of due process if the deficient representation merely prevents the alien from being eligible for * * * a discretionary decision"); *Huicochea-Gomez* v. *INS*, 237 F.3d 696, 699-700 (6th Cir. 2001)

self acknowledges (Pet. 9) that "seeming solidarity" in the court of appeals' decisions.[3]

Petitioner's effort (Pet. 9-12) to identify a circuit conflict in that uniform precedent fails. Not one of the cases petitioner cites holds that aliens have a liberty interest protected by the Due Process Clause in having

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(denying ineffective assistance of counsel claim because the alien had no liberty interest in cancellation of removal).

[3] See also *Jupiter* v. *Ashcroft*, 396 F.3d 487, 492 (1st Cir. 2005) (aliens have no liberty interest in discretionary relief of adjustment of status or voluntary departure); *Kwai Fun Wong* v. *United States*, 373 F.3d 952, 968 (9th Cir. 2004) (no Fifth Amendment liberty interest in temporary parole); *Munoz* v. *Ashcroft*, 339 F.3d 950, 954 (9th Cir. 2003) (denial of discretionary relief, which is a privilege created by Congress, cannot violate a substantive interest protected by due process); *United States* v. *Wilson*, 316 F.3d 506, 510 (4th Cir.) (in appeal from an illegal re-entry criminal conviction, court denied alien's due process claim because aliens have no liberty interest in discretionary relief), cert. denied, 538 U.S. 1025 (2003); *Smith* v. *Ashcroft*, 295 F.3d 425, 431 (4th Cir. 2002) (alien has no liberty or property interest in a discretionary waiver of deportability); *Oguejiofor* v. *Attorney General*, 277 F.3d 1305 (11th Cir. 2002) (same); *Escudero-Corona* v. *INS*, 244 F.3d 608 (8th Cir. 2001) (finding no due process or equal protection violation where the underlying relief sought was subject to the Attorney General's unfettered discretion); *Ashki* v. *INS*, 233 F.3d 913, 921 (6th Cir. 2000) (discretionary relief of suspension of deportation is not an interest protected by the Due Process Clause); *Appiah* v. *INS*, 202 F.3d 704, 709 (4th Cir.) (same), cert. denied, 531 U.S. 857 (2000); *Tefel* v. *Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999) (alien has no constitutionally protected interest in relief subject to the Executive Branch's unfettered discretion), cert. denied, 530 U.S. 1228 (2000); *Adras* v. *Nelson*, 917 F.2d 1552, 1558 (11th Cir. 1990) (no liberty interest in discretionary immigration parole); *Achacoso-Sanchez* v. *INS*, 779 F.2d 1260, 1264 (7th Cir. 1985) (no liberty interest in adjustment of status); *Velasco-Gutierrez* v. *Crossland*, 732 F.2d 792, 798 (10th Cir. 1984) (no liberty interest in discretionary deferred action).

their private attorneys advise them that they can apply for a form of discretionary relief. In fact, the Seventh Circuit in *United States* v. *Roque-Espinoza*, 338 F.3d 724 (2003) (cited at Pet. 10), shared the court of appeals' view here that "it would be hard to show that the loss of a chance at wholly discretionary relief from removal is the kind of deprivation of liberty or property that the due process clause is designed to protect." *Id.* at 729. The language in the Seventh Circuit's opinion upon which petitioner relies (Pet. 10) did not pertain to a claim of ineffective assistance of counsel and was, in any event, obiter dicta, introduced by the court's statement that "we have no need to reach Roque-Espinoza's further argument," 338 F.3d at 729, and followed immediately by the conclusion that "[w]e need not decide here how far this line of analysis can be taken * * * because Roque-Espinoza's failure to exhaust the remedies available to him dooms his case no matter what," *id.* at 730.

The Ninth Circuit's decision in *Nakamoto* v. *Ashcroft*, 363 F.3d 874 (2004) (cited at Pet. 12), is inapt. That case held only that, under 8 U.S.C. 1227(a)(1)(G), the factual and legal determination of whether an alien committed marriage fraud is not committed exclusively to the discretion of the Attorney General (or the Secretary of Homeland Security). That case did not concern the purely discretionary decision to reopen a case based on private counsel's errors in connection with a possible application for discretionary relief from removal or to grant relief from removal and adjustment of status based on a subsequent marriage to a different United States citizen, under 8 U.S.C. 1227(a)(1)(H). See also Pet. App. 5 n.3 (distinguishing *Nakamoto* and noting that the court's decision in this case involved the additional and distinct question of obtaining a discre-

tionary waiver of the condition on admission based on a good faith marriage, which was not at issue in *Nakamoto*).[4]

3. Petitioner further errs (Pet. 6-8) in arguing that the court of appeals' decision conflicts with this Court's decision in *INS* v. *St. Cyr*, 533 U.S. 289 (2001). *St. Cyr* involved the distinct question of whether aliens can obtain review of a pure question of law in habeas corpus proceedings. The Court held that applying the statutory provisions barring direct judicial review to bar habeas review of such a question would raise a substantial constitutional question under the Suspension Clause, U.S. Const. Art. I, § 9, Cl. 2. See *St. Cyr*, 533 U.S. at 300. Accordingly, in the absence of an express statutory provision proscribing review of claims in habeas corpus, this Court declined to apply the statutory limitations on direct judicial review to that habeas corpus proceeding. *Id.* at 314. *St. Cyr* did not involve any question of ineffective counsel or the application of the Due Process Clause to requests for purely discretionary relief. And the court of appeals' decision in this case did not address the availability of relief in habeas corpus, nor did it address what claims an alien could raise in a petition for a writ of habeas corpus. Accordingly, *St. Cyr* furnishes no reason for granting review in this case.

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[4] The Eighth Circuit's decision in *Patel* v. *Ashcroft*, 375 F.3d 693 (2004) (cited at Pet. 10), does not conflict with the Fifth Circuit's jurisdictional holding in this case because the Eighth Circuit did not address that jurisdictional issue in its opinion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
ALISON MARIE IGOE
Attorneys

MAY 2005

No. 04-682

(2)

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In The Supreme Court of the United States

JIGNESHKUMAR PATEL,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY, FORMERLY KNOWN AS IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONER

REKHA SHARMA-CRAWFORD
Sharma-Crawford, LLC
7208 West 80th, Ste. 202
Overland Park, Kansas 66204
(913) 385-9821

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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REPLY BRIEF FOR PETITIONER

Pursuant to Supreme Court Rule 15.6, Petitioner addresses the following new points raised in the Brief in Opposition.

I. The questions presented in this case do not rise or fall with the actions of a private attorney, but rather, they involve an alien's right to seek discretionary relief.

Respondent's sole focus on the actions of a private attorney serves only to minimize the questions raised before this Court. The actions of a private attorney are indeed consequential, however, the continued denial of the right to apply for discretionary relief was an independent and continuing violation. The issue presented before this Court is the right of an alien to seek discretionary relief irrespective of the outcome. Although the facts of Petitioner's case involved ineffective assistance of Counsel, it was not the sole issue raised on appeal to the Board of Immigration Appeals or the Fifth Circuit Court of Appeals.

Ultimately, the true merits of the Petitioner's right to seek discretionary relief have repeatedly gotten lost in the judicial, statutory, and regulatory Gordian Knot into which immigration law has been twisted.

Absent the intervention of this Court, the right to seek discretionary relief will continue to be wrongfully commingled with the right to that relief. Support for this premise is found squarely in Respondent's own failure to recognize this distinction in his reliance on numerous Circuit decisions that only support the lack of a constitutional right to the discretionary decision (Res. fn 2&3), and not the right to application.

II. The actions of a private attorney, as related to the right to seek discretionary relief, are contemplated within the Agency regulations, and an Agency's violation of its own regulations is a due process violation.

Petitioner filed a nearly 400 page Motion to Re-Open and Reconsider with the Board of Immigration Appeals. Contained within that Motion was the argument that Petitioner had discretionary relief available to him, which was not explored, at the Immigration Court level. The Motion asked that the case be reopened so that Petitioner could apply for such relief. The Board, in denying the Motion, never addressed the merits of the Motion and instead denied relief based on technical reasons. (Pet. App.12-14).

The Code of Federal Regulations, at 8 CFR §1003.2(c)(1) enumerate the duties of the Board of Immigration Appeals with respect to Motions to Re-Open where the individual seeks discretionary relief. The regulation indicates that:

> ...nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if *it appears that the alien's right to apply for such relief was fully explained to him* or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. (emphasis added)

While Respondent indicates that Petitioner failed to exhaust his remedies with regards to this issue, Petitioner respectfully submits that the regulations do not specify who must advise the alien of his rights. Thus, the failure of Petitioner's own Counsel is contemplated within the statute. The regulations require that a determination be made, by the BIA, and that the right to seek relief be protected.

Respondent claims that Petitioner has "not provided any case that has held that alleged omissions in the advice rendered by the alien's privately retained counsel....constitute a deprivation of liberty without due process", Petitioner submits that the purpose of the provisions relating to Motions to Re-Open, when applied incorrectly, provide a basis themselves. (Res. 8). This Court long ago recognized that where an agency fails to follow its own regulations, a due process violation has occurred. *Accardi v. Shaughnessy*, 347 US 260 (1954).

III. The Fifth Circuit denied jurisdiction based on 8 USC §1252(a)(2)(B)(ii) insofar as the relief sought was discretionary. The Court's reliance on this provision of law does not recognize the right to seek discretionary relief regardless of the outcome. The resolution of this question presents a split within the circuits.

The Fifth Circuit had before it the Immigration Judge's decision, the Board's decision affirming without opinion the Immigration Judge's decision, and the Board's decision denying Petitioner's Motion to Re-Open. The merits of the timely filed Motion to Re-open and Remand have never been addressed by the Board or the Circuit Court.

The Fifth Circuit declined to examine the merits of the Motion to Re-Open and Remand because it concluded that, since contained within the Motion was a request for discretionary relief, the Court lacked jurisdiction. This holding is contrary to the Seventh Circuit in *Chowdhury v. INS*, 241 F3rd 848 (7th Cir. 2001). In this case the Seventh Circuit recognized that there was a right to have a Motion to Re-Open "heard on its merits by the Board". In reaching this conclusion, the Seventh Circuit did not divest themselves of jurisdiction despite the underlying relief sought being

discretionary. Thus, Respondent's claims of a lack of a Circuit split is without merit.

Respondent incorrectly states that *Patel v. Ashcroft*, 375 F.3d 693 (8th Cir. 2004) does not create a further circuit split. The Eighth Circuit made no comment as to jurisdiction because it accepted jurisdiction. Obviously, the Court's willingness to hear and decide the matter indicates the Court's acknowledgement that it had jurisdiction.

Respondent's next claim that *Nakamoto v. Ashcroft*, 363 F.3rd 874 (9th Cir. 2004) did not create a Circuit split, is also simply wrong. The Fifth Circuit, themselves recognized that *Nakamoto* supported Petitioner's claims. The Fifth Circuit, however, declined to accept jurisdiction because they found that since 8 USC §1252 denied them partial jurisdiction, the issues raised by Petitioner as it related to *Nakamoto* were immaterial.

Respondent's attempt to point out that *United States v. Torres*, 383 F. 3d 92 (3rd Cir. 2004) and *United States v Roque-Espinoza*, 338 F.3d 724 (7th Cir. 2003) support the Fifth Circuit's holding in this matter, is in error. Actually, both *Torres* and *Roque-Espinoza* Courts analyze the same Supreme Court Case, *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 11-15 (U.S., 1979) and arrive at a wholly different conclusion regarding the right to seek discretionary relief. That difference is acknowledged by the *Torres* Court in their decision. *See Torres* n. 15.

Finally Respondent seeks to disclaim this Court's analysis in *INS v. St Cyr,* 533 U.S. 289 (2001). Relief under INA §212 (c) is discretionary. This Court, in granting St Cyr relief, held that the discretionary nature of that relief did "not affect the propriety of our conclusion." It is that analysis

which supports Petitioner's contention that he, too, had an interest in at least being able to seek his discretionary relief.

CONCLUSION

The difference between the right to seek discretionary relief and denial of such a right can be grave. It is as this Honorable Court so clearly recognized the difference between possible deportation and probable, or in this case, absolute deportation. Given the human tragedy that is guaranteed in the simple act of denying an opportunity this Court should grant Certiorari and resolve the legal conflict.

Respectfully submitted,

REKHA SHARMA-CRAWFORD
By Rekha Sharma-Crawford
Kansas Bar No. 16531
7208 W. 80th, Ste. 202
Overland park, KS 66204
(913) 385-9821, FAX (913) 385-9964
ATTORNEY FOR JIGNESHKUMAR PATEL